

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

OLIVIAH CONSTABLE,

Plaintiffs,

v.

**BAYERISCHE MOTOREN WERKE
AG, BMW OF NORTH AMERICA,
LLC, BMW MANUFACTURING
CO., LLC and JOHN DOES 1-5**

Defendants.

**CIVIL ACTION
FILE NUMBER:**

**NOTICE OF REMOVAL BY DEFENDANTS BMW OF NORTH
AMERICA, LLC and BMW MANUFACTURING CO., LLC**

Pursuant to 28 U.S.C. §§ 1441, et seq., Defendants BMW of North America, LLC (“BMW NA”) and BMW Manufacturing Co., LLC (“BMW MC”) by and through their counsel, hereby give Notice of Removal of the above-styled action from the State Court of Gwinnett County, State of Georgia to the United States District Court for the Northern District of Georgia, Atlanta Division. BMW NA and BMW MC submit that original subject matter jurisdiction exists in the United States District Court for the Northern District of Georgia, Atlanta Division, and avers the following in support of this Notice of Removal:

1. On or about April 16, 2021, the Plaintiff, Oliviah Constable, filed this action in the State Court of Gwinnett County, State of Georgia. The Complaint

identified Bayerische Motoren Werke AG, BMW of North America, LLC, and BMW Manufacturing Co., LLC, and John Does 1-5 as defendants and sought to recover damages relating to injuries sustained by Plaintiff which Plaintiff claims to have occurred as a result of failures of the front-passenger door and seatbelt of a 2013 BMW 328i during a single-vehicle accident.

2. The Complaint asserts claims for strict product liability, negligence, and seeks the recovery of compensatory damages. *See* Plaintiff's Complaint, attached as Exhibit "A".

I. Jurisdictional Basis for Removal

3. There is jurisdiction over this removed action pursuant to 28 U.S.C. § 1441 because this action originally could have been filed in the United States District Court pursuant to 28 U.S.C. § 1332(a). Specifically, the United States District Court has subject matter jurisdiction over this action because there is the requisite diversity of citizenship between the Plaintiff and BMW NA and BMW MC and the amount in controversy exceeds seventy-five thousand dollars (\$75,000.00), exclusive of interest and costs.

4. BMW NA was served with a copy of the Complaint on April 21, 2021. BMW MC was served with a copy of the Complaint on April 28, 2021. Bayerische Motoren Werke AG has not been served with a copy of the Complaint.

5. Pursuant to 28 U.S.C. §1446(b), the Notice of Removal is to be filed “within thirty (30) days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty (30) days after service of the summons upon the defendant” 28 U.S.C. §1446(b).

6. The thirty (30) day period for removal did not accrue until no earlier than April 21, 2021 when BMW NA was served. Thus, pursuant to Rule 6(a)(1) of the Federal Rules of Civil Procedure and 28 U.S.C. §1446(b), this notice of removal filed on or before May 21, 2021 is timely.

7. In determining whether diversity is satisfied, the citizenship of the named plaintiff is determined at the time the complaint is filed and at the time of removal. *See generally Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (*per curiam*).

8. Paragraph 1 of the Complaint indicates that “Plaintiff is a citizen and resident of Fulton County, Georgia.” *See* Plaintiff’s Complaint, ¶ 1.

9. BMW NA is a Delaware corporation with its principle place of business in the State of New Jersey. (Complaint, ¶ 4).

10. BMW MC is a Delaware corporation with its principle place of business in the State of South Carolina. (Complaint, ¶ 6).

11. BMW AG is corporation organized and existing under the laws of the Federal Republic of Germany with principal place of place of business in Munich, Germany. (Complaint, ¶ 2).

11. Fictitious Defendants', including John Does 1-5, citizenship should be disregarded for purposes of removal. *See* 28 U.S.C. § 1441(b).

12. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. §1332 because the requisite diversity of citizenship exists, as the plaintiff is a citizen of the State of Georgia and BMW AG, BMW NA and BMW MC are not residents of Georgia.

II. The Amount in Controversy Has Been Satisfied

13. Plaintiff's Complaint does not specify the amount of damages he seeks, but the damages sought clearly exceed the \$75,000.00 jurisdictional limit. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F. 3d 744, 754 (11th Cir. 2010) ("when the Complaint does not claim a specific amount of damages, removal from state court is proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional amount") (internal quotations and citations omitted).

14. Defendants meet this burden by showing either that it is facially apparent from the Complaint, or by putting forth "additional evidence

demonstrating that removal is proper.” *Roe v. Michelin N. Am., Inc.* 613 F. 3d 1058, 1061 (11th Cir. 2010).

15. Plaintiffs seek damages in the Complaint for compensatory and special damages, including medical expenses and lost wages, plus costs. *See*, Plaintiff’s Complaint, ¶¶ 87-91. Here, Plaintiff’s medical bills from Piedmont Healthcare alone total approximately \$448,000.00. *See* Exhibit B. Further, “[A]s specified in § 1446(a), a defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant’s allegation.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014).

16. Accordingly, the amount in controversy is satisfied. *See* 28 U.S.C. § 1332.

III. The Procedural Requirements for Removal Have Been Established

17. This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) because there is complete diversity of citizenship among the properly joined parties, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

15. BMW AG and BMW MC have attached as Exhibit C to this Notice of Removal the entirety of the filings in the State Court of Gwinnett County, as required under 28 U.S.C. §§ 1441, 1446.

16. This Notice of Removal is being served upon counsel for Plaintiff and contemporaneously filed with the Clerk of State Court of Gwinnett County, Georgia. Copies of the Notice of Filing Notice of Removal, together with the Notice of Removal, are being served upon Plaintiff's counsel pursuant to 28 U.S.C. § 1446(b).

17. Bayerische Motoren Werke AG, a resident of Germany, has not been served. "Defendants (at least those not citizens of the forum state) who are unserved when the removal petition is filed need not join in it." *Getty Oil Corp., a Div. of Texaco v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262 (5th Cir. 1988).

18. The filing fee of \$402.00 has been paid electronically into the registry of the United States District Court at the time of filing the Notice of Removal.

19. All procedural requirements for removal have been satisfied.

WHEREFORE, Defendants BMW of North America, LLC and BMW Manufacturing Co., LLC respectfully remove this action to the United States District Court for the Northern District of Georgia, Atlanta Division based on the fact that original subject matter jurisdiction exists pursuant to 28 U.S.C. § 1332.

Respectfully submitted, this 21st day of May, 2021.

/s/ DAVID V. HAYES

David V. Hayes

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FILE NUMBER: 21-C-02983-S4

RULE 7.1 CERTIFICATION

By her signature below, and as required by LR 7.1, NDGA, counsel for Defendants BMW of North America, LLC and BMW Manufacturing Co., LLC, certifies that the foregoing pleading has been prepared with Times New Roman font, size 14.

/s/ David V. Hayes

David V. Hayes

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **Notice of Removal** to all other parties by causing a copy of the same to be filed electronically through the Court's ECF system, which will cause copies of the same to be delivered electronically to:

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This 21st day of May, 2021.

Owen, Gleaton, Egan, Jones & Sweeney, LLP

/s/ David V. Hayes

David V. Hayes

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